

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NEUSTAR, INC,)	
)	
PETITIONER,)	
)	
v.)	No. 15-1080
)	
FEDERAL COMMUNICATIONS COMMISSION)	
and UNITED STATES OF AMERICA,)	
)	
RESPONDENTS.)	

**MOTION OF THE FEDERAL COMMUNICATIONS COMMISSION
TO DISMISS FOR LACK OF FINALITY
OR, IN THE ALTERNATIVE, TO HOLD IN ABEYANCE**

The Federal Communications Commission respectfully moves to dismiss the petition for review filed by Neustar, Inc. The petition seeks judicial review of a March 26, 2015 Commission order¹ that is not final Commission action; rather, it is an interim step in a process that, after *additional* Commission action, may result in the selection of a new Local Number Portability Administrator (Administrator). Because the order from which Neustar seeks review is not final, the Court lacks jurisdiction to review it. 28 U.S.C. § 2342(1) (limiting the Court's jurisdiction to

¹ Order, *Telcordia Technologies, Inc. Petition to Reform Amendment 57 and to Order a Competitive Bidding Process for Number Portability Administration; Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration, and to End the NAPM LLC's Interim Role in Number Portability Administration Contract Management; Telephone Number Portability*, WC Docket Nos. 07-149 & 09-109, CC Docket No. 95-116, FCC 15-35 (adopted Mar. 26, 2015) (*Order*).

review of “final orders of the Federal Communications Commission”). We therefore ask the Court to dismiss the petition. In the alternative, we ask the Court to hold the case in abeyance until the Commission has determined whether to approve an (at this time still potential) contract that would authorize a different company, Telcordia Technologies, Inc. (Telcordia) to serve as the next Administrator.²

BACKGROUND

Telephone number “portability” allows customers to keep their telephone numbers when they switch service providers, and thus fosters competition among voice service providers. The Commission is statutorily tasked with “designat[ing] one or more impartial entities to administer telecommunications numbering.” 47 U.S.C. § 251(e)(1). Pursuant to this authority, the Commission has authorized a third party to serve as the Local Number Portability Administrator, which operates the database that enables porting. Petitioner Neustar is the current Administrator, but its contract may terminate in the not-too-distant future (though no sooner than September 30, 2016).

The process to select a new Administrator has involved multiple steps over the course of several years—of which the *Order* is merely the latest stage. In

² In a separate pleading filed today, the Commission opposed Neustar’s Motion to Expedite Briefing and Oral Argument, which is obviously inconsistent with the relief the Commission seeks here.

March and May 2011, the Commission’s Wireline Competition Bureau, after seeking public comment, determined the process that would be used to select the next Administrator.³ The Bureau determined that the North American Numbering Council (Council)—the Commission’s Federal Advisory Committee on telephone numbering matters—in consultation with North American Portability Management, LLC (NAPM)—an industry group that manages the current Administrator contract—would have responsibility for specific tasks, such as developing the Request for Proposals and other bid documents, reviewing the bids, and making a recommendation to the Commission about who should serve as the next Administrator. The orders made clear that the agency would have the final authority to select the Administrator. *May 2011 Order*, 26 FCC Rcd at 6841 (¶¶ 8, 19). *See also Order* ¶ 195 (“As stated in the *May 2011 Order*, the Commission has ‘final approval authority of the contract’”).

Two companies, Neustar and Telcordia, bid to become the new Administrator. On April 25, 2014, the Council recommended that the Commission award Telcordia the contract to serve as the next Administrator. *Order* ¶ 12. On

³ *See generally, Telephone Number Portability*, WC Docket No. 09-109, Order and Request for Comment, 26 FCC Rcd 3685 (2011) (*March 2011 Order*); *Petition of Telcordia Technologies, Inc. to Reform or Strike Amendment 70, to Institute Competitive Bidding for Number Portability Administration, and to End the NAPM LLC’s Interim Role in Number Portability Administration Contract Management*; *Telephone Number Portability*, WC Docket No. 09-109, Order, 26 FCC Rcd 6839 (2011) (*May 2011 Order*).

March 26, 2015, the Commission approved that recommendation, contingent upon the NAPM and Telcordia reaching contract terms that earned Commission approval. *Order* ¶¶ 1-3. The Commission authorized the NAPM to begin contract negotiations with Telcordia, *id.* ¶ 3, and ordered that, “[o]nce contract terms are reached and a Code of Conduct is finalized, the NAPM [] submit the contract and Code of Conduct to the Commission for review and approval.” *Id.* ¶ 193. But the Commission stressed that, “[i]n the event that negotiations with the NAPM do not result in an acceptable contract, we retain all options.” *Id.* Those options include, among others, authorizing the NAPM to begin negotiations with Neustar or restarting the bidding process altogether. The Commission thus made clear that the *Order* was one step, “but not the final one,” in selecting the next Local Number Portability Administrator. *Id.* ¶ 2.

ARGUMENT

1. Under the Hobbs Act, 28 U.S.C. § 2342(1), and section 402(a) of the Communications Act, 47 U.S.C. § 402(a), the Court’s jurisdiction extends “only to *final orders*” of the FCC. *N. Am. Catholic Educ. Programming Found. v. FCC*, 437 F.3d 1206, 1209 (D.C. Cir. 2006). As this Court has held, “[f]inality under the Hobbs Act is to be narrowly construed.” *Blue Ridge Env’tl. Def. League v. NRC*, 668 F.3d 747, 753 (D.C. Cir. 2012) (internal citations omitted). “A final order in an administrative adjudication is normally ‘one that disposes of all issues as to all

parties.” *CSX Transp. Inc. v. Surface Transp. Bd.*, 774 F.3d 25, 29 (citing *Blue Ridge Envtl. Def. League*, 668 F.3d at 753).

Two conditions generally must be met for an agency action to be final. “First, the action must mark the ‘consummation’ of the agency’s decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’” *Blue Ridge*, 668 F.3d at 753 (quoting *Bennett v. Spear*, 520 U.S. 154, 177 (1997)).

The *Order* on review here is not final because it quite plainly does not mark the “consummation” of the Commission’s process of selecting the next Administrator.⁴ It does not dispose of all issues as to all parties. It does not guarantee that Telcordia will become the next Administrator or that Neustar will not. Indeed, the Commission made clear that the NAPM should *begin* the process of negotiating a contract with Telcordia, but that any proposed contract eventually reached will be subject to full Commission approval before the Administrator selection is finalized. The *Order* expressly and repeatedly stresses that the Commission has not made a final selection of the next Administrator:

- The Commission stressed that it “retain[s] all options” if an acceptable contract is not reached. *Order* ¶ 193.

⁴ Nor does the *Order* determine the rights and obligations of either Neustar or the next Administrator. Those rights and obligations will not be determined until the contract provisions are reached and the Commission approves them.

- The Commission observed that “[t]his Order represents an important milestone [in the selection process], but not the final one.” *Order* ¶ 2.
- The Commission emphasized that it was “authoriz[ing] the NAPM to negotiate a proposed contract with the next LNPA, *which the Commission will review* for consistency with this Order.” *Id.* ¶ 3 (emphasis added).
- The Commission noted that “[t]he [selection] process is not yet concluded The terms of the LNPA contract still must be negotiated.” *Id.* ¶193.
- The Ordering Clause provided that the NAPM “is directed to negotiate the proposed terms of the LNPA contract in accordance with this Order, and submit the proposed contract to the Commission for approval.” *Id.* ¶ 199.
- The Commission made clear that the proposed Administrator would have to satisfy all security concerns in order to garner Commission approval. “[R]egardless of the bidder selected, all security requirements, policies, and procedures will have to be met and, as required, mitigated to our satisfaction before we will approve the LNPA contract.” *Id.* ¶ 85.
- The Order directed Telcordia to transfer its voting stock to a voting trust, but noted that the terms of such trust must receive advance, written approval from the Wireline Competition Bureau. *Order* ¶ 182.

This Court has repeatedly explained that, “[w]hen completion of an agency’s processes may obviate the need for judicial review, it is a good sign that an immediate agency decision is not final.” *CSX Transp.*, 774 F.3d at 30 (quoting *DRG Funding Corp. v. Sec’y of Hous. and Urban Dev.*, 76 F.3d 1212, 1215 (D.C. Cir. 1996)). *See also Global Crossing Telecom., Inc. v. FCC*, No. 12-1482 (*per curiam*) (D.C. Cir. May 15, 2015) (concluding that the challenged order was interlocutory and noting that subsequent agency decisions could have obviated

petitioner's challenge). Limiting judicial review to final agency actions serves practical purposes, by avoiding "piecemeal appellate consideration of rulings that may fade into insignificance by the time proceedings conclude." 774 F.3d at 31 (internal citations omitted).

That is precisely the situation here. If the NAPM is unable to reach contract terms with Telcordia, or if the contract terms that the NAPM reaches with Telcordia are not acceptable to the Commission, the Commission might direct the NAPM to negotiate contract terms with Neustar or might restart the entire process of selecting a new Administrator.⁵ Either event could pretermitt this Court's need to address Neustar's challenges to the *Order*. The Commission thus understood correctly that the *Order* was not the final action it would need to take to select the next Administrator. The petition for review accordingly should be dismissed.

2. In the alternative, if the Court chooses not to reach the Commission's motion to dismiss at this time or declines to dismiss Neustar's petition, we respectfully request that the Court hold this case in abeyance until contract terms are negotiated with Telcordia, the Commission has made a decision to approve or reject the contract, and (assuming it continues to wish to litigate at that time) Neustar has petitioned for review from the Commission's eventual order. Holding

⁵ In responding to an argument that Neustar made in the administrative proceeding below, the Commission made clear that selecting an Administrator *subject to final contract negotiation* demonstrates that the Commission has discretion to select a different Administrator if contract negotiations are not successful. *Order* ¶ 25.

the case in abeyance and thereafter consolidating Neustar's challenges will conserve judicial and administrative resources. If the Commission does not approve the contract terms, Neustar's position and arguments might shift dramatically. Even if the Commission approves the contract, it would be efficient to hold the case in abeyance so that the Court can consider at one time all procedural and substantive challenges to the determination of the next Administrator.

Moreover, holding the case in abeyance is unlikely to result in substantial delay. On April 27, 2015, the NAPM, which is the entity negotiating contract terms with Telcordia, submitted a "Transition Oversight Plan" that proposes to conclude negotiations within 120 days. *See* Exhibit A (April 27, 2015 letter from Todd D. Daubert, Counsel to the NAPM LLC, to Marlene Dortch, Secretary, Federal Communications Commission, Transition Oversight Plan, Att. 3A). Under that schedule, a contract is supposed to be submitted to the Commission for review by August 26, 2015.⁶ The Commission is committed to reviewing any proposed contract expeditiously. Therefore, holding the case in abeyance would result only

⁶ The transition plan has been put out for comment and the comment period closes on June 1, 2015. *Public Notice*, Wireline Competition Bureau Seeks Comment on the North American Portability Management LLC's Transition Oversight Plan for Local Number Portability Administrator Contract, WC Docket Nos. 07-149 and 09-109, CC Docket No. 95-116, DA 15-554 (rel. May 7, 2015).

in a modest deferral and would permit the parties to address, and the Court to consider, related matters in a single proceeding.

Neustar will in the interim continue to be paid for its work as the Administrator through at least September 2016, and will *in addition* be paid for its work on the transition (on a cost-plus basis that allows it to earn a profit on all transition services). Holding the case in abeyance thus significantly conserves resources while posing little risk of harm or extended delay.

CONCLUSION

For the foregoing reasons, the Commission moves to dismiss Neustar's petition for review for lack of jurisdiction or, alternatively, requests that the Court hold the case in abeyance until the Commission determines whether to approve a proposed contract with Telcordia.

Respectfully submitted,

Jonathan B. Sallet
General Counsel

David M. Gossett
Deputy General Counsel

Richard K. Welch
Deputy Associate General Counsel

/s/ Lisa S. Gelb

Lisa S. Gelb
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

May 21, 2015

15-1080

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v.

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CERTIFICATE OF SERVICE

I, Lisa S. Gelb, hereby certify that on May 21, 2015, I electronically filed the foregoing Motion of the Federal Communications Commission to Dismiss for Lack of Finality or, in the Alternative, to Hold in Abeyance with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Kannon K. Shanmugam
Marcie R. Ziegler
Williams & Connolly LLP
725 12th Street, NW
Washington, DC 20005
Counsel for: Neustar, Inc.

Christopher J. Wright
John T. Nakahata
Timothy J. Simeone
Mark D. Davis
Harris Wiltshire & Grannis
1919 M Street, NW
Eighth Floor
Washington, DC 20036
Counsel for: Telcordia

Robert B. Nicholson
Scott A. Westrich
U.S. Department of Justice
Antitrust Division, Room 3224
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
Counsel for: USA

Peter Karanjia
Davis Wright Tremaine LLP
1919 Pennsylvania Ave., NW
Suite 800
Washington, DC 20006
Counsel for: CTIA, et al.

/s/ Lisa S. Gelb